

UNITED STATES OF AMERICA  
UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
NORTHERN DIVISION

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BRYAN ALLEN CARY,

Petitioner,

Case No. 2:13-cv-207

v.

Honorable R. Allan Edgar

ROBERT NAPEL,

Respondent.

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**MEMORANDUM AND ORDER**

U.S. Magistrate Judge Greeley entered a Report and Recommendation (“R&R”) recommending that Petitioner’s § 2254 habeas petition be dismissed with prejudice. Doc. No. 7. Petitioner has filed an objection to the R&R. Doc. No. 8. This Court is required to make a de novo determination of those portions of the R&R to which an objection has been filed, and may accept, reject, or modify any or all of the Magistrate Judge’s findings or recommendations. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

Magistrate Judge Greeley recommended that Petitioner’s petition be denied because it is barred by the one-year statute of limitations. In his objection, Petitioner asserts that his prior direct appeal and motion for relief from judgment were improperly denied. The Sixth Circuit has held that a habeas petitioner who demonstrates a credible claim of actual innocence based on new evidence may, in exceptional circumstances, be entitled to equitable tolling of habeas limitations. See *McCray v. Vasbinder*, 499 F.3d 568, 577 (6th Cir. 2007); *Souter v. Jones*, 395 F.3d 577, 597-98 (6th Cir. 2005). Petitioner has made no

such showing. Petitioner further argues that the one-year statute of limitations for petitions of habeas corpus, pursuant to 28 U.S.C. § 2244(d), is unconstitutional. This argument is without merit.

Petitioner's objection to the R&R [Doc. No. 8] is without merit and is DENIED. Magistrate Judge Greeley's R&R [Doc. No. 7] is APPROVED and ADOPTED as the opinion of the Court pursuant to 28 U.S.C. § 636(b)(1) and W.D. Mich. L. Civ. R. 72.3(b). The petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254 is DENIED and DISMISSED WITH PREJUDICE.

If Petitioner files a notice of appeal, it will be treated as an application for a certificate of appealability which shall be DENIED pursuant to 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b)(1); and *Slack*, 529 U.S. at 484. Reasonable jurists could not find that this decision to dismiss Petitioner's claims is debatable or wrong.

A Judgment consistent with this Memorandum and Order will be entered.

SO ORDERED.

Dated: 5/5/2014

/s/ R. Allan Edgar  
R. Allan Edgar  
United States District Judge